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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 GEORGE O. MITCHELL,

7 Plaintiff,

8 v.

9 STATE OF WASHINGTON, KELLY J.
10 CUNNINGHAM, THOMAS BELL,
11 RANDALL GRIFFITH, CHRISTINE
12 HAUETER,

13 Defendants.

14 No. C12-5403 BHS/KLS

15 **REPORT AND RECOMMENDATION**
16 **Noted for: June 21, 2013**

17 Before the Court is Defendant Randall Griffith's Motion for Summary Judgment. ECF
18 No. 43. On April 18, 2013, Defendants provided Plaintiff with a notice consistent with *Woods v.*
19 *Carey*, 684 F.3d 934, 935, 940-41 (9th Cir. 2012). ECF No. 45. Defendants' summary judgment
20 motion was noted for May 17, 2013 and Plaintiff's response should have been filed by May 13,
21 2013. Plaintiff's response, dated May 17, 2013, was filed on May 20, 2013. ECF No. 61.
22 Defendant Griffith moves to strike Plaintiff's response as untimely. ECF No. 62.

23 Although it was filed a few days beyond the deadline, Plaintiff was responding not only
24 to Defendant Griffith's motion, but also to a second motion for summary judgment filed by the
25 remaining defendants (State Defendants) (ECF No. 46), which has since been re-noted for
26 August 23, 2013. ECF No. 64. Defendant Griffith also argues that the documents attached to
Plaintiff's response should be stricken because his evidence contains hearsay and violates
numerous Rules of Evidence. ECF No. 62, pp. 2-3. However, Defendant has not specified what
evidence is objectionable and why. Keeping in mind that evidence at the summary judgment

1 stage must be either admissible evidence or evidence that could be presented in admissible form
 2 at trial (Fed.R.Civ.P. 56(c)(2)), the Court has considered Plaintiff's entire response.

3 Based on the Court's review of the motions, opposition, summary judgment evidence,
 4 and balance of the record, the Court concludes that Defendant Griffith's motion for summary
 5 judgment should be granted and Plaintiff's claims against Defendant Griffith be dismissed.
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7 FACTS

8 A. Sworn Allegations in Amended Complaint¹

9 Plaintiff George O. Mitchell is a resident of the Special Commitment Center (SCC)
 10 operated by the Washington State Department of Social and Health Services at McNeil Island.
 11 Mr. Mitchell was civilly committed to the SCC as a sexually violent predator in April of 2003.
 12 *In re Detention of Mitchell*, 160 Wash.App. 669, 672, 249 P.3d 662, 662 (Div. 2, 2011). In his
 13 First Amended Complaint, Mr. Mitchell alleges that defendants violated his civil rights by failing
 14 to adequately treat his Hepatitis C. ECF No. 9, ¶¶ 6.1 – 6.13. Mr. Mitchell alleges that he tested
 15 positive for Hepatitis C in December 2000 and that during 2002 and 2003, he was receiving
 16 treatment at the Tacoma Digestive Disease Center with Dr. W. Michael Priebe. *Id.*, ¶¶ 5.1 – 5.7.
 17

18 In February 2003, Dr. Priebe and Mr. Mitchell agreed to delay interferon/ribavirin
 19 treatment until after Mr. Mitchell lost weight. *Id.*, ¶ 5.8. In April 2005, Mr. Mitchell had lost
 20 thirty pounds, but he wanted to lose some more weight before starting treatment. *Id.*, ¶¶ 5.10 –
 21 5.14. On December 28, 2008, Mr. Mitchell sent a letter to Kim Deitch, RN 3 “outlining
 22 nutritional issues for people with hepatitis C.” He received no reply. *Id.*, ¶ 5.15. On May 6,
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 25 ¹ Where the nonmoving party is *pro se*, a court must consider as evidence in opposition to summary judgment all
 26 contentions “offered in motions and pleadings, where such contentions are based on personal knowledge and set
 forth facts that would be admissible in evidence, and where [the party appearing *pro se*] attested under penalty of
 perjury that the contents of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th
 Cir. 2004) (citation omitted), *cert. denied*, 546 U.S. 820, 126 S. Ct. 351, 163 L.Ed.2d 61 (2005).

1 2009, Mr. Mitchell met with Defendant Bell to review his blood tests, which confirmed that Mr.
 2 Mitchell's hepatitis C was getting worse. Mr. Mitchell asked Defendant Bell to start injections
 3 of interferon and ribarvirin. Defendant Bell refused, stating that African-Americans have a 30%
 4 success rate, the treatment was expensive, the virus would still be in his system, Mr. Mitchell
 5 was healthy, and that the treatment is hard on the body. Mr. Mitchell disagreed with Defendant
 6 Bell and argued that he would have a better chance of completing the rigorous twelve month
 7 treatment while he was healthy. Defendant Bell refused to recommend Mr. Mitchell for the
 8 treatment. *Id.*, ¶¶ 5.19 – 5.27.

10 In late July 2010, Mr. Mitchell asked Nurse Deitch about the letter he sent to her on
 11 December 28, 2008. She signed him up to meet with Randall Griffith ARNP and Ms. Christine
 12 Haueter, a dietician. On August 11, 2010, Mr. Mitchell told Defendant Griffith about his May 6,
 13 2009 conversation with Defendant Bell. According to Mr. Mitchell, Defendant Griffith changed
 14 the subject and started talking about a new blood pressure medicine. Mr. Mitchell told
 15 Defendant Griffith that he did not want to add to the three he was already taking because of
 16 possible damage to his liver. *Id.*, ¶¶ 5.15, 5.20, 5.27, 5.32. Mr. Mitchell asked Defendant
 17 Griffith to recommend a “nutritional diet consisting of freshly cooked food, and vitamins,
 18 reducing processed and canned foods with salt additives...”. *Id.*, ¶ 5.34. Defendant Griffith told
 19 Mr. Mitchell that he could recommend a low sodium or 2200 calorie diet, but that he lacked
 20 authority to direct Paul Temposky², the food services manager, to provide Mr. Mitchell with the
 21 diet he was requesting. *Id.*, ¶ 5.35.

24 Based on the foregoing allegations, Mr. Mitchell contends that Defendant Griffith should
 25 have intervened and informed his superior or an outside agency that Mr. Mitchell was being
 26

² Plaintiff refers to Paul Temposky as “Defendant Temposky,” however Paul Temposky is not named as a defendant in the First Amended Complaint.

1 subjected to medical abuse. He contends that Defendant Griffith should have taken action after
2 Mr. Mitchell told him that Defendant Bell was refusing to treat him. He also contends that
3 Defendant Griffith should have “overridden” the food services manager and provided Mr.
4 Mitchell with a “medical diet.” ECF No. 9, pp. 10-11.

5 **B. Facts Relating to Medical Care Provided by Defendant Griffith**

6 Randall Griffith is a licensed healthcare practitioner. He earned his ARNP in 1999 and a
7 doctorate in nursing practice (DNP) in 2010. ECF No. 44, Declaration of Randall Griffith, at p.

8 1. Between January 2004 and December 2011, he was employed as an independent contractor to
9 provide basic healthcare services to civil detainees and residents of SCC. *Id.*

10 According to records attached to Mr. Mitchell’s response, Mr. Griffith referred Mr.
11 Mitchell to a specialist for evaluation and “HCV treatment” in February 2005. ECF No. 61, at p.
12 37. Mr. Mitchell was referred to Dr. W. Michael Priebe. *Id.* In April 2005, Mr. Griffith
13 prepared a medical summary on Mr. Mitchell which included the note: “GI (2003) for hepatitis
14 C-treatment options outlined, but not started (patient reluctance at that point).” *Id.*, pp. 46-47.

15 In 2009 and 2010, Mr. Griffith discussed two primary issues with Mr. Mitchell, which
16 included Mr. Mitchell’s shoulder/upper back pain and high blood pressure. ECF No. 44, Griffith
17 Decl., p. 2, Attachment A. Mr. Griffith learned of Mr. Mitchell’s shoulder and upper back injury
18 in September 2009. He conducted a physical examination and referred Mr. Mitchell out to
19 physical therapy. In addition, Mr. Griffith was deeply concerned about Mr. Mitchell’s ongoing
20 high blood pressure. In March, May, and August of 2010, he encouraged Mr. Mitchell to take
21 blood pressure medication to reduce his high blood pressure. He also continued to prescribe a
22 low sodium diet to address Mr. Mitchell’s hypertension. *Id.*, at 3. According to Mr. Griffith, the
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1 medical records demonstrate that Mr. Mitchell was not always compliant with his low sodium
2 diet. *Id.*, Exhibit A.

3 On August 11, 2010, Mr. Griffith saw Mr. Mitchell for a recheck of his hypertension. At
4 that time, Mr. Mitchell requested a specialized “Hepatitis C diet.” Although Mr. Griffith
5 attempted to direct the conversation to Mr. Mitchell’s ongoing high blood pressure, Mr. Mitchell
6 insisted on discussing the Hepatitis C diet. Mr. Griffith told Mr. Mitchell that he had no
7 authority to order any specialized diet beyond the diets recognized by the SCC, which included a
8 low calorie diet and/or a low sodium diet. He told Mr. Mitchell that he had no authority to
9 prepare the type of customized diet that Mr. Mitchell was requesting. *Id.*, at p. 3. As far as Mr.
10 Griffith is aware, there is no such thing as a medically recognized “Hepatitis C diet,” and a diet
11 that consists of fruits and vegetables, vitamin supplements, and an aversion to preservatives, is
12 not recognized as something to combat Hepatitis C. It is Mr. Griffith’s opinion that such a diet
13 does not appear medically necessary. *Id.* However, because he wanted to remain attentive to
14 Mr. Mitchell’s needs and requests, Mr. Griffith referred Mr. Mitchell to dietician Christine
15 Haueter to discuss Mr. Mitchell’s dietary concerns.³

16 Mr. Griffith learned later that Mr. Mitchell had grieved the lack of a “Hepatitis C” diet.
17 Mr. Griffith did not deny the grievance. The decision to deny Mr. Mitchell’s request for the diet
18 was made by SCC Superintendent Kelly J. Cunningham. ECF No. 44, Griffith Decl., p. 4,
19 Exhibit B (letter dated October 12, 2010 from Dr. Cunningham to George Mitchell, with copies
20 to Medical Director Les Sziebert, RN3 Kim Deitch, ARNP Randall Griffith, Dietician Christine
21 Haueter).

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³ Mr. Mitchell’s claims against Christine Haueter were dismissed. ECF No. 42.

1 Mr. Griffith is aware that Mr. Mitchell met with Dr. Thomas Bell in 2009 to discuss
2 initiating Interferon treatment and he is also aware that Dr. Bell declined Mr. Mitchell's request
3 for Interferon treatment at that time. According to Mr. Griffith, Mr. Mitchell did not discuss
4 Interferon treatment with him, did not request that Mr. Griffith place him on Interferon
5 treatment, and did not request that Mr. Griffith "override" Dr. Bell's decision. The issue was
6 simply not discussed during Mr. Griffith's encounters with Mr. Mitchell. ECF No. 44, Griffith
7 Decl., p. 2. Moreover, some medical decisions were beyond Mr. Griffith's authority. For
8 example, in 2010, requests for Interferon treatment required the approval of the medical director
9 and requests for a customized diet required the approval of the Food Services Manager. *Id.*, p. 4.

10
11 Mr. Griffith states that he was attentive to Mr. Mitchell's medical needs by referring him
12 to physical therapy for his upper back and shoulder pain and by attempting to prescribe
13 appropriate medication and ordering a low sodium diet to address Mr. Mitchell's high blood
14 pressure issues. Even though he thought that Mr. Mitchell's request for a customized "Hepatitis
15 C" diet lacked a medical foundation, he still referred Mr. Mitchell on to a dietician to discuss his
16 concerns. ECF No. 44, Griffith Decl., at p. 4.

17
18 **SUMMARY JUDGMENT STANDARD**

19 The Court shall grant summary judgment if the movant shows that there is no genuine
20 dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R.
21 Civ. P. 56(a). The moving party has the initial burden of production to demonstrate the absence
22 of any genuine issue of material fact. Fed. R. Civ. P. 56(a); *see Devereaux v. Abbey*, 263 F.3d
23 1070, 1076 (9th Cir. 2001) (en banc). To carry this burden, the moving party need not introduce
24 any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the
25 absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato*

1 *Johnson*, 212 F.3d 528, 532 (9th Cir.2000). A nonmoving party’s failure to comply with local
 2 rules in opposing a motion for summary judgment does not relieve the moving party of its
 3 affirmative duty to demonstrate entitlement to judgment as a matter of law. *Martinez v.*
 4 *Stanford*, 323 F.3d 1178, 1182-83 (9th Cir. 2003).

5 “If the moving party shows the absence of a genuine issue of material fact, the non-
 6 moving party must go beyond the pleadings and ‘set forth specific facts’ that show a genuine
 7 issue for trial.” *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (*citing Celotex*
 8 *Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). The non-
 9 moving party may not rely upon mere allegations or denials in the pleadings but must set forth
 10 specific facts showing that there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*,
 11 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A plaintiff must “produce at least
 12 some significant probative evidence tending to support” the allegations in the complaint. *Smolen*
 13 *v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990). A court “need not examine the
 14 entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in
 15 the opposing papers with adequate references so that it could conveniently be found.” *Carmen v.*
 16 *San Francisco Unified School District*, 237 F.3d 1026, 1031 (9th Cir. 2001). This is true even
 17 when a party appears *pro se*. *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007).

DISCUSSION

21 A prisoner’s claim of inadequate medical care does not constitute cruel and unusual
 22 punishment unless the mistreatment rises to the level of “deliberate indifference to serious
 23 medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The
 24 rights of one who is civilly committed are analyzed using the same standards that apply to
 25 pretrial detainees. *Jones v. Blanas*, 393 F.3d 918, 931–32 (9th Cir.2004). The Eighth and

1 Fourteenth Amendments both guarantee that inmates and detainees receive constitutionally
 2 protected medical care. *Conn v. City of Reno*, 572 F.3d 1047, 1054 (9th Cir.2009). An officer's
 3 deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth
 4 Amendment, and *a fortiori*, the Fourteenth. *Id.* at 1054–55.

5 The “deliberate indifference” standard involves an objective and a subjective prong.
 6 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” *Farmer v.*
 7 *Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (*citing Wilson v. Seiter*,
 8 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Second, the prison official must
 9 act with a “sufficiently culpable state of mind,” which entails more than mere negligence, but
 10 less than conduct undertaken for the very purpose of causing harm. *Farmer*, 511 U.S. at 837. A
 11 prison official does not act in a deliberately indifferent manner unless the official “knows of and
 12 disregards an excessive risk to inmate health or safety.” *Id.*

14 In applying this standard, the Ninth Circuit has held that before it can be said that a
 15 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
 16 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
 17 cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.1980), *citing*
 18 *Estelle*, 429 U.S. at 105–06. “[A] complaint that a physician has been negligent in diagnosing or
 19 treating a medical condition does not state a valid claim of medical mistreatment under the
 20 Eighth Amendment. Medical malpractice does not become a constitutional violation merely
 21 because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. at 106; *see also Anderson v.*
 22 *County of Kern*, 45 F.3d 1310, 1316 (9th Cir.1995); *McGuckin v. Smith*, 974 F.2d 1050, 1050
 23 (9th Cir.1992), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136
 24 (9th Cir.1997) (en banc). Even gross negligence is insufficient to establish deliberate

1 indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th
2 Cir.1990). A prisoner's mere disagreement with diagnosis or treatment does not support a claim
3 of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989).

4 Mr. Mitchell contends that Defendant Griffith should have intervened and informed his
5 superior or an outside agency that Mr. Mitchell was being subjected to medical abuse. He
6 contends that Defendant Griffith should have taken action after Mr. Mitchell told him that
7 Defendant Bell was refusing to treat him. He also contends that Defendant Griffith should have
8 "overridden" the food services manager and provided Mr. Mitchell with a "medical diet." ECF
9 No. 9, pp. 10-11.

11 Viewing the evidence in the light most favorable to Mr. Mitchell, the Court first notes
12 that there is no evidence that Mr. Mitchell was being "subjected to medical abuse." The records
13 reflect that Mr. Griffith knew that Mr. Mitchell saw Dr. Priebe in 2005 to discuss Hepatitis C
14 treatment but Mr. Mitchell was reluctant to begin treatment at that time. Mr. Griffith knew that
15 Mr. Mitchell met with Dr. Thomas Bell in 2009 to discuss Interferon treatment and that Dr. Bell
16 declined Mr. Mitchell's request for Interferon treatment at that time. According to Mr. Griffith,
17 Mr. Mitchell did not discuss Interferon treatment with him, did not request that Mr. Griffith place
18 him on Interferon treatment, and did not request that he "override" Dr. Bell's decision. ECF No.
19 44, Griffith Decl., p. 2. However, Mr. Mitchell contends that on August 11, 2010, he spoke with
20 Mr. Griffith "about [his] conversation with Defendant Bell on May 6, 2009 in detail." ECF No.
21 61, at p. 3.

24 Although the parties dispute whether Mr. Griffith was involved in any discussion about
25 Interferon treatment (including Mr. Mitchell's contention that Dr. Bell declined the treatment, in
26 part, because the "treatment doesn't work on African-Americans"), it is undisputed that Mr.

1 Griffith did not have the authority to order Interferon treatments or to countermand medical
2 decisions relating to Interferon treatment. It is also undisputed that he had no authority to order a
3 customized diet or to countermand dietary decisions made by the Food Services Manager. ECF
4 No. 44, Griffith Decl., p. 4. The evidence reflects that Mr. Griffith appropriately handled Mr.
5 Mitchell's medical complaints by referring him to physical therapy for his neck and shoulder
6 pain and by prescribing a low sodium diet, exercise, and attempt to prescribe blood pressure
7 medication. When Mr. Mitchell wanted a customized diet, Mr. Griffith referred him to a
8 dietician to address those concerns.

10 Mr. Mitchell has not shown that Mr. Griffith knew of and disregarded an excessive risk
11 to his health. Instead, it appears that Mr. Mitchell is complaining that he is being denied the type
12 of treatment and diet that he would like to receive. However, a claim of deliberate indifference
13 requires more than a different of opinion between the patient and prison medical authorities
14 regarding treatment. *Franklin v. State of Oregon, State Welfare Div.*, 662 F.2d 1337, 1344 (9th
15 Cir. 1981)(citing *Estelle v. Gamble*, 428 U.S. at 105-107).

17 CONCLUSION

18 Based on the foregoing, the undersigned recommends that Defendant Griffith's Motion
19 for Summary Judgment (ECF No. 43) be **GRANTED**, and Plaintiff's claims against Defendant
20 Griffith be **dismissed with prejudice**.

21 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
22 Procedure, the parties shall have fourteen (14) days from service of this Report to file written
23 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
24 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the
25

1 time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on
2 **June 21, 2013**, as noted in the caption.

3 **DATED** this 31st day of May, 2013.
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5 
6 Karen L. Strombom
7 United States Magistrate Judge